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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA, *et al.*,
Petitioners,

v.

CURTIS W. MCGHEE, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether prosecutors can be liable for an allegedly wrongful prosecution and conviction based on alleged misconduct occurring prior to the time that charges are filed.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments throughout the United States.[1] Because state and local governments usually finance the operations of state and local prosecutors, and generally indemnify prosecutors for their legal costs so that prosecutors can go about their duties without inordinate fear of liability, state and local governments bear the financial burden of defending prosecutors who are sued for activities undertaken within the scope of their employment. The potential financial burden of liability for wrongful convictions is substantial. For example, one of the few section 1983 wrongful conviction cases to go to trial resulted in a verdict of $1 million per year in compensatory damages for fifteen years of imprisonment. *See Newsome v. McCabe*, 319 F.3d 301, 302-03 (7th Cir.), *cert. denied*, 539 U.S. 932 (2003). Moreover, to the extent that the threat of liability inhibits state and local prosecutors from the vigorous performance of their duties, that inhibition would undermine the efforts of state and local governments to undertake aggressive law enforcement measures. Because of their vital interest in preserving an effective doctrine of prosecutorial immunity from civil liability, *amici* submit this brief to assist the Court in its resolution of this case.

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[1] The parties have consented to the filing of this *amicus* brief and their consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

On the morning of July 22, 1977, the body of John Schweer, a security guard and retired captain of the Police Department of Council Bluffs, Iowa, was found on the railroad tracks near O'Neill Datsun, one of three automobile dealerships that employed him to provide nighttime security. Pet. App. 24a.[2] Schweer had been killed by a 12-gauge shotgun blast in the chest. *Id.* Detectives Daniel Larsen and Lyle Brown, along with petitioners David Richter, the County Attorney for Pottawattamie County, and Joseph Hvrol, an Assistant County Attorney, undertook an investigation. Pet. App. 25a.

Several days before he died, Schweer had written a note indicating that he had chased an individual that he had seen trying to get into a vehicle at McIntyre Oldsmobile. Pet. App. 25a. He had also told a Council Bluffs police officer that he had seen a man, accompanied by a dog, carrying what appeared to be a rifle or car jack near O'Neill Datsun. *Id.* Footprints and dog prints had been found at the scene of the murder, and matching prints were found to the west of that location. Pet. App. 25a-26a.

James Burke, who worked at a Northwestern Bell location west of the murder scene, told Detective Brown that he had seen a man with a shotgun and a dog running on the night of July 19, and had later encountered Schweer, who had asked Burke if he had seen a man running in the area. Pet. App. 26a.

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[2] Because this is an interlocutory appeal denying petitioners immunity from suit, we take as true all facts that the district court deemed sufficiently supported for purpose of its ruling on the motion for summary judgment. *See Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996).

This account brought to Detective Larsen's mind Charles Gates, an area resident known to carry a shotgun while walking his dog. *Id.* David Waide, who worked near the crime scene, subsequently identified a photo of Gates as a man that Waide had last seen walking his dogs in the area on July 19, and two other area residents stated that they had seen a man matching Gates' description walking dogs in the area as recently as July 22. Pet App. 27a. Detective Larsen also learned that Gates had been a suspect in a 1963 homicide of a co-worker. *Id.* Gates agreed to take a polygraph examination, and the examiner believed that Gates had not been truthful when he had denied owning a shotgun or shooting Schweer. *Id.*

On September 19, 1977, police in Lincoln, Nebraska, stopped a stolen Cadillac containing three African-American teenagers; the driver was Kevin Mack, a/k/a Kevin Hughes, and passengers were Roderick Jones and Candice Pride. Pet App. 28a-29a. Hughes had a long criminal record, but denied knowing that the Cadillac Deville had been stolen. Pet. App. 29a. Hughes told police that three other individuals—Anthony Houston and respondents Terry Harrington and Curtis McGhee—had stolen a number of vehicles and had given him permission to drive the Cadillac. Pet. App. 60a. The next day, Hughes wrote a statement indicating that one of the car thieves had told him that he had stolen the car in Council Bluffs and "had killed this honkey." Pet. App. 61a.

After being told by the Nebraska police that Hughes might have information about Schweer's murder, Detectives Larsen and Brown went to Lincoln to interview him. Pet. App. 29a. The detectives

told Hughes that they knew he was involved in a car theft ring and that his confederates had murdered Schweer, and added that Hughes would not be charged and might even receive assistance on other pending charges and the $5,000 reward that had been offered if he could assist in the prosecution and conviction of Schweer's killers. *Id.*

Hughes initially told the detectives that an individual named Steven Frazier had told him that he had killed a security guard in the course of stealing a Lincoln Continental from McIntyre Oldsmobile, but the detectives rejected that account because no Lincoln had been stolen from McIntyre. Pet. App. 30a, 61-63a. Hughes later said that an individual named Arnold Kelly was involved in the Schweer killing, but the police determined that Kelly had been in Kansas City at the time. Pet. App. 30a, 63a-64a. Hughes also originally claimed that he was not present when Schweer was murdered, but after a polygraph examination produced indications of deception, Hughes admitted that this was a lie. Pet. App. 30a, 64a. In a September 30 statement, Hughes admitted that he was with the others at McIntyre Olds when Schweer was shot. Pet. App. 64a. Hughes was then brought to Council Bluffs for questioning. Pet. App. 30a.

A process then began by which the police and prosecutors began to work with Hughes in order to produce an account that was consistent with the evidence. Pet. App. 30a. For example, Hughes originally claimed that Harrington, McGhee, and Houston were looking for cars to steal on the night of the murder, and that Hughes stayed in their vehicle while the others went to steal a Toronado from McIntyre Oldsmobile, but Hughes later dropped Houston from the account after being told that Houston was

in jail at the time. Pet. App. 30a-31a, 65a. Hughes also originally claimed that Schweer was killed with a pistol, and later a 20-gauge shotgun, and only after he was told that a 12-gauge shell had been found at the scene did he say that the murder weapon had been a 12-gauge shotgun. Pet. App. 31a, 66a. Hughes also changed his account of where the murder took place after learning where Schweer's body had been found. Pet. App. 31a, 65a. Hughes originally stated that Harrington and McGhee had picked him up at approximately 11 PM, but after police learned that Harrington's football coach had seen him elsewhere around that time, Hughes stated that he had not been picked up until midnight. Pet. App. 32a-33.

In a taped statement, Jones stated that he was with Hughes and an individual named Clyde Jacobs when Harrington and McGhee picked up Hughes at about 11:30 PM on the night of the murder. Pet. App. 33a. He made that statement only after Detective Brown had told him that he should admit that he saw McGhee, Harrington, and Hughes together or risk being charged. *Id.* At McGhee's trial, Jones testified that he saw respondents pick Hughes up at 11 or midnight sometime in mid-July, and at Harrington's trial, Jones testified that this occurred on July 21 at midnight or 12:30 AM. Pet. App. 33a-34a. Jacobs told investigators that he saw Harrington and another individual pick up Hughes, and at McGhee's trial he testified that this occurred after midnight, while at Harrington's trial he testified that it occurred after 11. Pet. App. 34a.

Pride had been dating Hughes, and was told that he would be charged with murder if she did not corroborate his account. Pet. App. 34a. On October 12,

Pride signed a statement indicating that in late July, she saw Harrington and McGhee pick up Hughes at about 10:45 PM, yet she recanted in an April 1978 statement to McGhee's lawyer, although she returned to the earlier account when she testified at McGhee and Harrington's trials. Pet. App. 34a.

Hughes eventually claimed that Harrington and McGhee dropped him off after the murder at about 1:30 AM at the house of his girlfriend, Linda Lee. Pet. App. 34a-35a. In October 1977, Lee signed a statement indicating that Hughes came to her house after midnight one evening in late July, and that she saw Harrington and another individual in Harrington's car. Pet. App. 35a.[3] Two workers at a business near the murder scene told police that on the night of the shooting, they heard a loud noise between 3 and 3:30 AM, and the medical examiner placed the time of death at around 4:00 AM. *Id.*

On November 16 and 17, 1977, respectively, preliminary informations, signed by Detective Brown and approved by petitioners, were filed charging respondents with murder, and both were arrested. Pet. App. 35a. On February 17, 1978, a true information was filed charging respondents with murder. Pet. App. 36a. Subsequently, the investigators sought out inmates who were jailed with McGhee to testify against him. Pet. App. 36a-37a. Tyrone Pierce was offered reduced charges, and after being placed in a cell near McGhee, he stated that McGhee admitted killing Schweer. Pet. App. 37a. In exchange for a promise that he would not go to a reformatory, Larry

[3] At McGhee's trial, Lee was unable to say when in July Hughes came over, or whether it was before or after 1 AM, and at Harrington's trial, she testified that Hughes came over after midnight twice on the same evening in July. *Id.*

Plater claimed that McGhee told him he had been present when Harrington killed a police officer. *Id.* Earl Hartwell told investigators that McGhee had told him that Harrington and another individual had shot a "sheriff" twice, although at trial he denied that he had said anything about another individual, and Hartwell's sentence was later reduced. *Id.*

On June 13, 1978, McGhee was convicted of first degree murder and sentenced to life in prison. Pet. App. 37a. Harrington was convicted and sentenced to life on August 4. *Id.* Petitioners never disclosed to the defense any of the information or reports identifying Charles Gates as a suspect. Pet. App. 5a, 36a; *see also id.* at 26a-27a.

In 1999, Anne Danaher, who worked at the prison where Harrington was incarcerated and who had gotten to know Harrington and his family, requested and received the Council Bluffs police file on Schweer's murder, and learned of the withheld reports involving Gates. Pet. App. 38a-39a. Harrington filed a petition for post-conviction relief based on the reports, which the trial court denied, but the Iowa Supreme Court reversed, and ordered Harrington's conviction vacated on the ground that the prosecution had breached its duty to disclose material exculpatory information to the defense. *See Harrington v. State*, 659 N.W.2d 509 (Iowa 2003).

McGhee then filed his own petition based on the Iowa Supreme Court's decision in Harrington's case. Pet. App. 39a. In the interim, Hughes, Jacobs, Jones, Pride and Lee had all recanted their prior testimony. *Id.* Negotiations ensued between the current County Attorney and McGhee's counsel, and McGhee eventually agreed to plead no-contest to second degree murder, with an agreed sentence of 25

years that would permit his immediate release. Pet. App. 39a-43a, 47a. The County Attorney decided to drop charges against Harrington. Pet. App. 44a-47.

Following the end of criminal proceedings, Harrington and McGhee brought suit against former County Attorney Richter, Assistant County Attorney Hrvol, Detectives Brown and Larsen and others alleging, among other things, a deprivation of their constitutional rights redressable under 42 U.S.C. § 1983. Pet. App. 22a. On the petitioners' motion for summary judgment, the district court ruled that they were not entitled to absolute prosecutorial immunity from suit for their conduct prior to filing of the true information because they "were acting in an investigatory capacity rather than in an advocatory capacity." Pet. App. 80a. The district court further ruled that petitioners were not entitled to qualified immunity on respondents' claims that they "sought [respondents'] arrest . . . without probable cause," and that they "fabricat[ed] evidence and coerce[ed] witness testimony." Pet. App. 100a, 113a.

In an interlocutory appeal taken by petitioners from the district court's denial of immunity, the court of appeals affirmed. It agreed with the district court that the evidence, taken most favorably to respondents, established that they were arrested without probable cause, and the court added that "before the establishment of probable cause to arrest, a prosecutor generally will not be entitled to absolute immunity." Pet. App. 11a. The court also concluded that "immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing

and fabricating evidence before filing formal charges . . . ." Pet. App. 19a.[4]

SUMMARY OF ARGUMENT

Compelling policy considerations support the rule that prosecutors are entitled to absolute immunity for their actions as advocates for the State. After all, prosecutors are expected to concern themselves with their professional obligations, not potential civil liability. Applying that rule of immunity here, the judgment of the court of appeals should be reversed.

Prior to filing charges, petitioners are alleged to have pressured witnesses and fabricated evidence. These allegations describe unprofessional conduct, but not a constitutional violation for which petitioners can be held liable. The Fourth Amendment forbids unreasonable search and seizure, such as arrest without probable cause, but that alleged violation occurred because petitioners filed charging documents and sought arrest warrants—all immunized acts. Similarly, the Due Process Clause forbids a wide variety of abusive governmental conduct, but only in connection with a deprivation of life, liberty, or property. Petitioners' handling of the Schweer murder investigation did not deprive respondents of life, liberty, or property—that deprivation occurred only when petitioners elected to bring charges and later failed to disclose exculpatory evidence—again, immunized acts.

Accordingly, petitioners' conduct prior to bringing charges did not amount to an actionable constitu-

[4] The court of appeals reversed the district court's refusal to grant the defendants immunity on respondents' state-law claims, finding them barred by sovereign immunity. Pet. App. 12a-17a.

tional tort. Instead, critical elements of both constitutional torts alleged here were petitioners' immunized charging and disclosure decisions.

Even if petitioners' pre-charging conduct were actionable, it is protected by prosecutorial immunity. Although the lower courts, relying on this Court's decision in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), held that prosecutorial conduct in the investigative stage is not entitled to absolute immunity, this Court's more recent decisions refuse to afford talismanic significance to the moment at which charges are filed—any prosecutorial action which is directed toward the manner in which a criminal case will be litigated is immunized. All the conduct alleged here involved efforts by prosecutors to build a case that would stand up in court, and is for that reason entitled to immunity.

ARGUMENT

The court of appeals held that prosecutors can be liable for constitutionally wrongful prosecutions and convictions based on their conduct prior to the filing of charges. None of petitioners' per-charging conduct, however, violated the Constitution. Moreover, all of the alleged pre-charging conduct had as its object the filing of charges and the presentation of evidence at trial, and for that reason is shielded by prosecutorial immunity.

In the discussion that follows, we consider first the rationale for prosecutorial immunity, and then explain why that immunity bars respondents' § 1983 action against petitioners.

I. THE DOCTRINE OF PROSECUTORIAL LIABILITY REFLECTS THE INABILITY OF PROSECUTORIAL LIABILITY TO PROMOTE THE OBJECTIVES OF TORT LAW.

It is settled that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (footnote omitted). Absolute immunity is essential because "fear of potential liability would undermine a prosecutor's performance of his duties by forcing him to consider his own potential liability when making prosecutorial decisions and by diverting his 'energy and attention . . . from the pressing duty of enforcing the criminal law.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 270 n.4 (1993) (quoting *Imbler*, 424 U.S. at 424-25 (ellipsis in original)).

Of course, the chill and distraction created by potential damages liability is not the complete explanation for prosecutorial immunity. For one thing, prosecutors rarely face a realistic threat of personal liability for actions within the scope of their employment. As Justice Breyer has observed, most public officials are indemnified for their legal costs and liabilities. *See Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 436 (1997) (dissenting opinion). By statute, policy, or contract, indemnification is common in public employment, although it is often unavailable for intentional or other serious misconduct. *See, e.g.*, Lawrence Rosenthal, *A Theory of Damages against the Government: Torts, Constitutional Torts, and*

Takings, 9 U. Pa. J. Const. L. 797, 812, 819-20 (2007).[5]

For another, as the Court has observed, damages liability is a more powerful means of deterring misconduct in the private sector because public employers operate within a system of political accountability rather than as profit-maximizers with an economic incentive to make cost-justified investments in liability reduction. *See Richardson v. McKnight*, 521 U.S. 399, 409-11 (1997). At best, public-sector damages liability can be expected to create a modest political incentive to take liability-avoiding precautions because damages awards force public employers to divert scarce public resources from what they are likely to regard as politically optimal uses. *See* Rosenthal, *supra*, at 831-43.

Thus, the threat of distraction and deterrence is an incomplete explanation for absolute prosecutorial immunity. In reality, the underlying rationale for immunity becomes apparent by comparing prosecutors to others engaged in law enforcement. The liability faced by police officers when enforcing the law could chill officers in the vigorous performance of their duties and distract them from their law-enforcement mission, yet the Court has declined to afford them absolute immunity, even when executing judicial process such as a warrant, on the ground that "the officer applying for a warrant . . . is further removed from the judicial phase of criminal proceed-

[5] This should be unsurprising; labor economics teaches that employers must offer sufficient compensation to account for the risk of liability that employees face and are likely to choose indemnification as the most efficient means of doing so. *See, e.g.*, Alan O. Sykes, *The Economics of Vicarious Liability*, 95 Yale L.J. 1231, 1239-43 (1984).

ings than the act of a prosecutor in seeking an indictment." *Malley v. Briggs*, 475 U.S. 335, 342-43 (1986). Absolute immunity, the Court has explained, is afforded only "to functions 'intimately associated with the *judicial* phase of the criminal process,'" *id.* at 342 (quoting *Imbler*, 424 U.S. at 430) (emphasis in original)). Qualified immunity, in contrast, is thought to provide officials performing investigative tasks with sufficient protections from liability. *See id.* at 343-44.

It is accordingly the prosecutor's intimate involvement with the judicial process that explains the rule of absolute immunity. Prosecutors are expected to concern themselves with their professional obligations to seek justice in the criminal process, not their potential liability to an investigative target. *See, e.g.*, ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Prosecution Function Standards 3-3.4, 3-3.9 & 3-3.11 (3d ed. 1993) (hereinafter "ABA Standards"). In fact, prosecutors who bring unwarranted charges or who fail to disclose exculpatory evidence risk having a prosecution founder, or a conviction set aside, with ensuing political and professional embarrassment. In extreme cases, prosecutors even face criminal or professional sanctions. *See Imbler*, 424 U.S. at 428-29. The additional deterrent effect of a civil damages remedy, which would be available only after a prosecution has resulted in an outcome favorable to the accused, and which would produce a judgment for which a prosecutor would likely be indemnified, is therefore vanishingly small.[6]

[6] It is settled that an accused cannot bring a civil action under section 1983 seeking damages for a wrongful prosecution or conviction until the prosecution has been terminated in a man-

Public-sector liability does create some budgetary—and therefore political—incentive to engage in risk management, but most prosecutors stay in office a relatively short time and therefore are more likely to be more concerned with the effect that important convictions may have on their own careers than with the long-term budgetary implications of aggressive prosecutorial tactics. *See, e.g.*, Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. Ann. Surv. Am. L. 45, 59-67 (2005); Shelby A.D. Moore, *Who Is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. Tex. L. Rev. 801, 825-30 (2006).

Equally problematic, the political incentive for elected officials to train their subordinates to avoid liability-creating behavior is likely to function poorly in the prosecutorial context. In all but three states and the District of Columbia, prosecutors hold office as independent elected officials. *See* Steven W. Perry, U.S. Dep't of Justice, *Prosecutors in State Courts, 2005* 11 (2006). The political independence of prosecutors is understandable; it is widely agreed that the administration of justice should be governed by professional norms and not subject to political interference. Yet independent prosecutors who do not levy taxes or appropriate revenues lack the direct political accountability for tax and spending policy experienced by legislators. For that reason, prosecutors and their staffs are likely to be less sensitive to the budgetary implications of prosecutorial actions that may generate exposure to liability.

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ner favorable to the accused. *See Heck v. Humphrey*, 512 U.S. 477, 484-90 (1994).

Moreover, the harms created by a regime of even limited prosecutorial liability would be great. To the extent that prosecutors faced a credible threat of personal liability, the likelihood of overdeterrence would be unacceptable. Prosecution witnesses, for example, recant their testimony with frequency, sometimes for good reason, but sometimes, as even advocates of the wrongfully convicted acknowledge, as a result of coercion or their relationships with defendants or their supporters. *See, e.g.*, Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves another Look*, 28 B.C. Third World L.J. 75, 85-86 (2008). If prosecutors faced a threat of liability every time a witness recanted and blamed his prior testimony on undue prosecutorial pressure, prosecutors could be paralyzed. A rule like the one adopted below, granting immunity limited to post-charging conduct, would have the perverse result of discouraging prosecutors from working with potential witnesses to make fully informed charging decisions, thereby crippling prosecutors in their role as advocates for the State. Conversely, taking the perhaps more realistic view that prosecutors are likely to be indemnified—and that civil suits are most likely in cases where indemnification is available to ensure that assets will be available to satisfy a judgment—the threat of civil liability is unlikely to affect prosecutorial behavior.

This Court "'ha[s] repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability' . . . and ha[s] interpreted the statute in light of the 'background of tort liability.'" *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) (internal citations omitted). For that reason, section 1983 should be construed in a manner that

affords compensation for and deterrence of unconstitutional conduct in the manner of traditional tort law. *See, e.g., Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305-07 (1986); *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980); *Robertson v. Wegmann*, 436 U.S. 584, 589-90 (1978). Yet, as we explain above, civil liability is likely to lead to either massive over- or underdeterrence of prosecutors. Accordingly, when prosecutors act as advocates, the threat of civil liability is unlikely to properly serve the deterrent function of the law of torts.

In contrast, the safeguards built into the criminal justice system, coupled with the ordinary processes of political accountability, are far more likely to deter such misconduct that the possibility of a damages remedy. The efficacy of political accountability should be apparent; there is, after all, no let's-convict-the-innocent lobby. Not only will overreaching prosecutors pay a political price; but such overreaching can lead to systemic reform as well. For example, since the wave of DNA exonerations of recent years, there has been a wave of reform legislation, with 46 states and the Federal Government enacting legislation granting accused or convicted individuals access to DNA evidence. *See Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2316-17, 2322 (2009).

While prosecutorial liability would provide compensation to the exonerated, but a regime of compensation without an effective and appropriate measure of deterrence would amount to a system of wrongful conviction insurance, not the type of tort liability for which section 1983 provides. Any wrongful conviction is a grievous wrong; from the standpoint of compensation, there is no less justification for a payment

to one who was convicted as a result of a constitutionally defective proceeding as to one who was convicted as the result of an innocent mistake. As we explain above, section 1983 creates a species of tort liability, not a system of social insurance. Prosecutorial liability, however, offers only the latter.

There may be sound policy arguments for providing some form of wrongful conviction insurance; indeed, the Federal Government and 22 States have statutes that require that compensation be paid to the exonerated. Many of these statutes, however, contain important limitations on who can make claims and the amount of compensation available, reflecting legislative efforts to balance the State's interest in compensating the exonerated against competing budgetary priorities. *See* Adam I. Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. Rev. 227, 233-35, 250-51 (2008). Yet, the policy decision whether to devote scarce public resources to the wrongfully convicted, instead of allocating them other urgent public responsibilities, is surely one for the legislature. The weakness of tort litigation as a means of providing social insurance at taxpayer expense, after all, is that judges and juries are in no position to weigh the importance of such insurance against other competing budgetary priorities.

For these reasons, the doctrine of absolute prosecutorial immunity has a compelling justification. When civil liability has little chance of providing anything like the kind of deterrence associated with traditional tort law, the rationale for diverting scarce public resources from the provision of governmental service to the public to the payment of judgments and the defense of litigation is wanting. Indeed, pro-

tecting the public fisc against undue liability burdens is one of the objectives of section 1983 that this Court has identified. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-95 (1978).

II. PETITIONERS ARE NOT LIABLE FOR THEIR PRE-CHARGING CONDUCT.

The lower courts acknowledged that petitioners are entitled to absolute immunity for everything they did upon filing charges against respondents, but believed that petitioners could be liable under section 1983 for their pre-charging conduct. Section 1983, however, affords a remedy only for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ." 42 U.S.C. § 1983. Even if the lower courts were correct that petitioners are entitled to only qualified immunity for their pre-charging conduct, this conduct is not actionable under section 1983 because it did not deprive respondents of any constitutional right, privilege, or immunity. Moreover, even if the pre-charging conduct was otherwise actionable, it was shielded by prosecutorial immunity.

A. Petitioners' Pre-Charging Conduct Was Not a Constitutional Tort.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). It follows that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defen-

dant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). *Accord, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

Respondents have pressed two constitutional claims on which the lower courts believed that petitioners could be held liable—violations of the Fourth Amendment's prohibition on unreasonable search and seizure and the Fourteenth Amendment's Due Process Clause. We consider each in turn.

1. *The Fourth Amendment Claim.*

The lower courts concluded that the evidence, viewed in the light most favorable to respondents, established that they were arrested without probable cause in violation of the Fourth Amendment. Petitioners' pre-charging conduct, however, is not actionable under the Fourth Amendment.[7]

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. There is no claim, however, that respondents were searched nor seized in connection with the Schweer investigation until they were charged. Prior to their

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[7] Claims relating to respondents' arrest are properly analyzed under the Fourth Amendment and not the Due Process Clause. Because deprivations of liberty associated with the filing of criminal charges are addressed by the Fourth Amendment, they are not cognizable as due process violations unless the plaintiff can identify some particular interest at stake that is not protected by the prohibition on unreasonable search and seizure. *See Albright v. Oliver*, 510 U.S. 266, 271-74 (1994) (plurality opinion); *id.* at 289-91 (Souter, J., concurring in the judgment). *Cf. Graham v. Connor*, 490 U.S. 386, 392-95 (1989) (claims of excessive force during arrest or investigative stops should be judged by the Fourth Amendment and not due process).

decision to approve the charges contained in the preliminary informations, petitioners had undertaken no search or seizure of respondents that could operate as the predicate for Fourth Amendment liability. The mere fact that an individual is under investigation by the authorities is not sufficient to render the Fourth Amendment applicable to investigative conduct. *Cf. Michigan v. Chesternut*, 486 U.S. 567, 574-76 (1988) (Fourth Amendment not implicated by police pursuit of suspect); *United States v. Knotts*, 460 U.S. 276, 282-85 (1983) (Fourth Amendment not implicated by continuous surveillance of suspect). Yet prior to the time that the preliminary informations were filed, all that petitioners had done was to place respondents under investigation.

Petitioners' decision to approve the charges contained in the preliminary informations surely led to respondents' arrests, but it was protected by prosecutorial immunity. As we explain above, it is settled that a prosecutor's decision to bring charges is shielded by immunity. The preliminary informations in this case were indistinguishable from the filing of an information and motion for an arrest warrant that the Court held entitled a prosecutor to absolute immunity on a Fourth Amendment claim in *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997).[8] Like the Washington statutes at issue in *Kalina*, Iowa law provided for the filing of a preliminary information

[8] In *Kalina*, while granting the prosecutor immunity for filing an information and motion for an arrest warrant, the Court denied immunity for executing a certification under penalty of perjury because by swearing to the truth of the allegations of probable cause to arrest, the prosecutor was acting as a witness rather than an advocate. *See* 522 U.S. at 129-31. In this case, however, Detective Brown swore to the truth of the allegations of probable cause.

in order to obtain an arrest warrant, *see* Iowa Code Ann. §§ 754.1-.7 (1977); and a judge's decision to issue a warrant based on a preliminary information is considered a judicial act under Iowa law even when the preliminary information is unsupported by probable cause or otherwise improper. *See Huendling v. Jenson*, 168 N.W.2d 745, 749-50 (Iowa 1969).

Thus, petitioners initiated the judicial process by approving the preliminary informations. The fact that respondents' arrests may have been unsupported by probable cause is no basis to deny petitioners' immunity for their decision to invoke judicial process; the claim in *Kalina* was no different. *See* 522 U.S. at 120-22, 129. The doctrine of prosecutorial immunity is, after all, based on the common-law rule "providing prosecutors with absolute immunity from tort actions based on claims that the decision to prosecute was malicious and unsupported by probable cause . . . ." *Id.* at 124 (footnote omitted).[9]

As in *Kalina*, petitioners likely decided to seek respondents' arrest prior to filing charges, but that is also no basis to deny them immunity. The decision to file charges—even preliminary charges that must eventually be supplemented by a formal charging document—is a legal judgment made by the State's advocate, and falls within the heart of immunity. If a plaintiff could overcome immunity by focusing on the pre-charging decision to bring charges, the immunity for charging decisions would become illusory;

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[9] The development of this rule came in the decades following the enactment of section 1983, but the Court found this common law development instructive since the office of public prosecutor in its modern form was previously largely unknown. *See Kalina*, 522 U.S. at 124 n.11; *Burns v. Reed*, 500 U.S. 478, 484-86 (1991).

every Fourth Amendment claim attacking a charge allegedly unsupported by probable cause could be reframed as an attack on an earlier decision to proceed on that charge.

In *Imbler*, the Court rejected a similar argument; it concluded that the prosecutor's immunity for the presentation of evidence necessarily reached an alleged failure to disclose exculpatory evidence to the defense because

> [a] claim of using perjured testimony simply may be reframed and asserted as a claim of suppression of the evidence . . . . Denying absolute immunity from suppression claims could thus eviscerate, in many situations, the absolute immunity from claims of using perjured testimony.

424 U.S. at 431 n.34. *Cf. Buckley*, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part) ("Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves.").[10]

In approving the preliminary informations, petitioners were not performing functions indistinguish-

[10] In any event, respondents cannot recover damages for their convictions on the Fourth Amendment claim. There is no reason to believe that an arrest unsupported by probable cause will produce a wrongful conviction as long as the accused is afforded a fair trial, and hence damages for the conviction are unavailable on a Fourth Amendment claim under the rules of proximate causation applied in section 1983 litigation. *See* John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 Va. L. Rev. 1461, 1470-77 (1989).

able from those of investigating officers; they were making a legal judgment about the commencement of legal proceedings. For that reason, they were entitled to prosecutorial immunity.

2. *The Due Process Claim.*

The lower courts concluded that petitioners' precharging efforts to shape witnesses' testimony while suppressing the Gates evidence was actionable under the Due Process Clause. Yet, petitioners' precharging conduct, even if imprudent or unethical, did not violate the Constitution.

Taking the evidence most favorably to respondents, petitioners placed a good deal of pressure on Hughes and other witnesses to cooperate with the investigation, and to provide what petitioners regarded as a credible account. This is not unusual; potential witnesses are frequently reluctant to cooperate with investigations of violent crimes, and prosecutors often find it necessary to offer significant carrots or sticks to obtain cooperation, especially from accomplice witnesses who face exposure for their own role in an offense. Petitioners may have gone too far in their investigation of Schweer's murder, but that alone does not make out a due process violation.

The fact that an investigation utilizes tactics that create a threat to the right to fair trial is not enough to violate due process; the critical constitutional question is whether the ensuing trial is fair. For example, the Court has held that even when investigators use an unnecessarily suggestive procedure to induce an eyewitness to identify a suspect, due process is not offended as long as the record as a whole indicates that the identification is accompanied by adequate indicia of reliability. *See Manson v.*

Brathwaite, 432 U.S. 98, 109-14 (1977). As the Court explained: "Unlike a warrantless search, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest." *Id.* at 113 n.13.[11]

The same is true of petitioners' pre-charging handling of the witnesses. The Due Process Clause addresses "depriv[ations] of life, liberty, or property." U.S. Const. amend. XIV, § 1. Prior to charging, however, petitioners had not deprived respondents of such a constitutionally protected interest. Their pre-charging handling of the witnesses may have been imprudent or even unethical, but "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry v. Johnson*, 467 U.S. 504, 511 (1984).

It is settled that the Constitution requires no "judicial oversight or review of the decision to prosecute." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975). *Accord, e.g., Albright v. Oliver*, 510 U.S. 266, 282-83 (1994) (Kennedy, J., concurring in the judgment); *Costello v. United States*, 350 U.S. 359, 362-64 (1956). A fortiori, the same is true of a prosecutor's investigative decisions. As long as respondents were afforded a fair trial at which they could to alert the jury to the prosecutors' efforts to tailor witness tes-

[11] For this reason, a number of circuits have held that damages liability is inappropriate for the use of unduly suggestive identification techniques absent a showing that they undermined the fairness of an ensuing trial. *See, e.g., Alexander v. City of South Bend*, 433 F.3d 550, 555-56 (7th Cir. 2006); *Pace v. City of Des Moines*, 201 F.3d 1050, 1055 (8th Cir. 2000); *Hutsell v. Sayre*, 5 F.3d 996, 1004-05 (6th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994).

timony, they received due process. *Cf. Buckley*, 509 U.S. at 281 (Scalia, J., concurring) ("[P]etitioner cites, and I am aware of, no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution."). And, as it happens, there is no claim that any of the evidence relating to petitioners' handling of the witnesses was kept from the defense during respondents' criminal prosecutions. The jury may have erred in crediting that testimony despite ample impeachment, but respondents were afforded due process.

As for petitioners' failure to disclose the exculpatory evidence relating to Gates, this omission was plainly unconstitutional—and resulted in vacatur of respondents' convictions—but this constitutional violation did not occur prior to charging. It occurred only after charges had been filed, and was accordingly immunized.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court concluded that the right to a fair trial secured by the Due Process Clause imposed an obligation on prosecutors to disclose exculpatory evidence to the defense. Even so, the suppression of exculpatory information deprives an accused of due process only when that there is a reasonable probability that the suppressed information affected the outcome of the trial. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 280-82 (1999); *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995). Accordingly, "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed

evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281.[12]

Thus, petitioners' pre-charging conduct did not run afoul of *Brady*; on the contrary, we know of no authority suggesting that due process somehow obligates prosecutors to halt an investigation in the face of exculpatory evidence. *Cf. United States v. Williams*, 504 U.S. 36, 51-55 (1992) (prosecutors are under no constitutional obligation to present exculpatory information to a grand jury). After all, "[t]he Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released." *Baker v. McCollan*, 443 U.S. 137, 145 (1979). There was surely no obligation on petitioners to put a stop to the efforts to determine if Hughes could supply reliable information about the Schweer murder so clear and well-established as of 1977 that it could deprive petitioners of qualified immunity merely because there was also evidence that pointed to Gates.

It was only when the Gates evidence was not disclosed in time for the defense to use it at respondents' trials, and when that nondisclosure had a material effect on the verdicts, that a due process violation occurred. That violation, however, was immu-

[12] A number of courts of appeals have held that the suppression of exculpatory evidence is not actionable when it has not produced a conviction. *See, e.g., Becker v. Kroll*, 494 F.3d 904, 923-24 (10th Cir. 2007); *Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999); *Rogala v. District of Columbia*, 161 F.3d 44, 55-56 (D.C. Cir. 1998) (per curiam); *Flores v. Satz*, 137 F.3d 1275, 1277-78 (11th Cir. 1998); *Taylor v. Waters*, 81 F.3d 429, 435-36 (4th Cir. 1996); *McCune v. City of Grand Rapids*, 842 F.2d 903, 906 (6th Cir. 1988).

nized. It is settled that a failure to disclose exculpatory evidence during the course of criminal proceedings is shielded by prosecutorial immunity. *See Van de Kamp v. Goldstein*, 129 S. Ct. 855, 862-64 (2009); *Imbler*, 424 U.S. at 431 n.34.

Due process forbids investigative tactics that "shock[ ] the conscience." *Lewis*, 523 U.S. at 846-47. A prosecutor's knowing use of perjured testimony at trial surely satisfies this standard, and has long been held a denial of due process, *see, e.g., Napue v. Illinois*, 360 U.S. 264, 269-70 (1959), even though, as we explain above, such violations are immunized from damages liability. Petitioners' pre-charging conduct, in contrast, deprived no one of liberty; moreover, it could result in no abuse of governmental power as long as petitioners' subsequent decisions about whether to charge respondents and how to proceed in the ensuing litigation were made in a manner consistent with the Constitution. Pressing potential witnesses to a violent crime and failing to disclose exculpatory evidence during the investigative stage accordingly was not "arbitrary, or conscience shocking, in a constitutional sense." *Lewis*, 523 U.S. at 847 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992)). These tactics would have been entirely unremarkable, in a constitutional sense, as long as the charges against respondents were supported by probable cause, and respondents were then afforded a fair trial at which all exculpatory evidence was disclosed.

In *Van de Kamp*, the Court held that §1983 claims against a District Attorney were barred by prosecutorial immunity because "an individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's

claim." 129 S. Ct. at 862. So it is here; an essential element of respondents' alleged due process violation—like the alleged Fourth Amendment violation—is petitioners' immunized charging and disclosure decisions.

B. Petitioners' Pre-Charging Conduct Is Shielded By Prosecutorial Immunity.

The lower courts believed that prosecutorial immunity did not attach in this case until petitioners filed formal charges, relying on this Court's decision in *Buckley*, in which the Court held that when prosecutors engage in investigative activities indistinguishable from those usually handled by the police, they are entitled to only qualified immunity. *See* 509 U.S. at 273-74.

This rigid division between prosecutors' pre- and post-charging activities is inconsistent with the realities of the prosecutive function. In *Buckley* itself, the Court acknowledged that "'the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom,' and are nonetheless entitled to absolute immunity." 509 U.S. at 272 (quoting *Imbler*, 424 U.S. at 431 n.33). Although the Court noted that the prosecutors in that case did not have probable cause to charge anyone when they allegedly engaged in the fabrication of evidence, *see id.* at 274, the Court stressed that immunity turned on a "function test," adding that absolute immunity is inappropriate "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer." *Id.* at 273.

In this case, petitioners have not been sued for mere investigative activities. Once Hughes told the

detectives that he knew about the Schweer murder, petitioners were not simply sifting clues and trawling for evidence, but instead had assumed the advocate's role of evaluating the prosecutive merits of a case based on Hughes' account. That is an advocate's function, even though it involved working with witnesses to assess whether their accounts provided a basis for bringing charges.

In *Buckley*, for example, the Court acknowledged that "an out-of-court 'effort to control the presentation of [a] witness' testimony' was entitled to absolute immunity because it was 'fairly within [the prosecutor's] function as an advocate." 509 U.S. at 272-73 (quoting *Imbler*, 509 U.S. at 430 n.32 (brackets in original)). Petitioners' pre-charging function was little different. Petitioners were working with Hughes to determine whether to file charges rather than preparing for a trial on a pending charge, but one of "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution . . . ." *Imbler*, 424 U.S. at 431 n.33; *see also Buckley*, 509 U.S. at 284 (Kennedy, J., concurring in part and dissenting in part) ("Actions in obtaining, reviewing, and evaluating witness testimony are a classic function of the prosecutor as advocate.") (citation and internal quotations omitted).

This Court rejected the mechanical approach to prosecutorial immunity taken below only last Term. *Buckley* stated that "when a prosecutor 'functions as an administrator rather than as an officer of the court' he is entitled only to qualified immunity." 509 U.S. at 273 (quoting *Imbler*, 424 U.S. at 431 n.33). In *Van de Kamp*, however, while the Court acknowledged that supervisory prosecutors had been sued in

that case for their role in establishing "the office's administrative procedures," 129 S. Ct. at 861, it held that supervisory policy decisions about how exculpatory information is made available are immunized because "[t]he management tasks at issue . . . concern how and when to make impeachment information available at a trial." *Id.* at 863.

Thus, it is the character of the challenged decision, rather than the point in time when it occurs, that controls the immunity inquiry. In this case, petitioners' efforts to shape witness testimony were directed at building a case for charging and trial, and for that reason are immunized. Indeed, a number of courts of appeals have concluded that even pre-charging conduct qualifies for absolute immunity when it is directed at producing evidence to be used at trial or other judicial proceedings. *See, e.g.*, *Cousin v. Small*, 325 F.3d 627, 633-35 (5th Cir.), *cert. denied*, 540 U.S. 826 (2003); *Higgason v. Stephens*, 288 F.3d 868, 877-78 (6th Cir. 2002); *Kohl v. Casson*, 5 F.3d 1141, 1146-47 (8th Cir. 1993).

If *Buckley* is understood to take a rigid temporal approach to immunity, asking only if a challenged prosecutive decision occurred prior to charging or the acquisition of probable cause, it is inconsistent with the realities of the prosecutive function. The process of developing the prosecution's case does not begin with charging; much of a prosecutor's pre-charging deliberations involve the advocate's role of assessing a case to determine whether it is sufficient to establish probable cause to charge. Prosecutors, of course, are expected to bring charges only upon evidence sufficient to sustain a conviction. *See* ABA Standards, *supra*, Prosecution Function Standard 3-3.9(a). *Buckley* is therefore inconsistent with the functional

test the Court has used for immunity. It also conflicts with the subsequent decision in *Van de Kamp*, which, as we explain above, concluded that the functional significance of a prosecutor's decision controls the immunity inquiry, rather than the question whether it occurred after charges were filed.

Buckley's approach has also proven difficult to apply because it makes immunity determinations turn on fact-intensive questions about when the prosecutors acquired probable cause and the capacity in which particular decisions were made. *See, e.g.*, *Broam v. Bogan*, 320 F.3d 1023, 1033-34 (9th Cir. 2003); *Hill v. City of New York*, 45 F.3d 653, 662-63 (2d Cir. 1995). An immunity test that turns on such a fact-intensive inquiry will often require substantial evidentiary proceedings, thereby undermining one of the central objectives of immunity—sparing prosecutors from the burden and distraction of civil litigation.

In addition, to the extent that *Buckley* makes immunity turn on whether a prosecutor is sued for actions occurring when there was probable cause to charge, it is inconsistent with the traditional test for immunity. This Court has analogized actions seeking damages for wrongful prosecutions and convictions to the tort of malicious prosecution because malicious prosecution was the common-law tort that permitted recovery of damages for confinement pursuant to legal process. *See Wallace v. Kato*, 549 U.S. 384, 388-90 (2007); *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). Yet, as we explain above, the common-law immunity that this Court has incorporated into § 1983 grants prosecutors immunity on malicious prosecution claims even though an element of that tort was the absence of probable cause. As Justice

Kennedy observed in *Buckley*, "the central component of a malicious prosecution claim is that the prosecutor in question acted maliciously and *without probable cause*." 509 U.S. at 286 (opinion concurring in part and dissenting in part) (emphasis in original). *Buckley*'s conclusion that a lack of probable cause is a basis to deny immunity is therefore inconsistent with the traditional test for immunity.

In *Buckley*, the majority gave no weight to this concern because it could identify "no common-law tradition of immunity" for pre-charging prosecutorial activity, but "found a common-law tradition of immunity for a prosecutor's decision to bring an indictment, whether he has probable cause or not." 509 U.S. at 274 n.5. Yet respondents seek to treat their confinement following their prosecution and conviction as a compensable wrong, even though there is no tradition of holding those who bring unsupported charges liable for confinement pursuant to legal process except through an action for malicious prosecution, on which the common law recognized prosecutorial immunity. *Buckley* accordingly created a prosecutorial liability without support in the common law.

In determining whether to revisit a precedent, this Court considers the precedent's "workability . . . and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009). Moreover, "[r]evisiting precedent is particularly appropriate where . . . a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." *Pearson*, 129 S. Ct. at 816. Precisely because plaintiffs have

no vested expectations in judge-made immunity doctrines, the Court has not hesitated to reexamine its constitutional tort immunity rules. *See id.* at 818-22; *Harlow*, 457 U.S. at 814-20.

The *Buckley* rule created no settled expectations that would be upset by its revision; and, as we explain above, it poses difficulties in application and misconceives the role of the prosecutor in the investigative process and the historical grounding for immunity. To the extent that *Buckley* supports the decision below, it should therefore be overruled. [13] As long as a prosecutor's challenged conduct is undertaken in the role of an advocate endeavoring to build the state's case with respect to an immunized decision about charging or the manner in which a criminal case is to be litigated, it should fall within the ambit of prosecutorial immunity.

[13] Accordingly, our submission preserves *Buckley*'s additional holding that a prosecutor lacks absolute immunity for statements made at a press conference, *see* 509 U.S. at 276-78, as well as the holding in *Burns* that prosecutors lack absolute immunity for legal advice given to the police, *see* 500 U.S. at 492-96.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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